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In the Supreme Court of the United States

OCTOBER TERM, 1958

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Customs Court, Third Division (R. 168-192), is reported at 38 Cust. Ct. 285, 151 F. Supp. 942. The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on November 14, 1958

(Pet. App. 11a). The petition for a writ of certiorari was filed on February 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the General Agreement on Tariffs and Trade requires the Internal Revenue Code tax on distilled spirits to be applied to imported 90 proof gin on the basis of alcoholic content as it is to gin of higher than 100 proof.

STATUTES AND TREATY INVOLVED

Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, provided:

> There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. * * *

Article II of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A14, provides in pertinent part:

> 1. * * * (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any

kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

* * * * *

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

* * * * *

Article III of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A18, as amended, 62 Stat. (Part III) 3679, provides in pertinent part:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic prod-

> ucts. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part VI) A2051, provides in pertinent part:

> 1. The Governments of * * * the Kingdom of the Netherlands * * * and the United States of America, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948:
>
> a) Parts I and III of the General Agreement on Tariffs and Trade, and
>
> b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

STATEMENT

In August, 1952, the petitioner imported from the Netherlands a shipment of 90 proof London dry gin (R. 6, 8). The Collector of Customs at San Francisco assessed an internal revenue tax of $10.50 per wine gallon in accordance with Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, 56 Stat. 970, 971 (now Section 5001(a) of the Internal Revenue Code of 1954, as amended, 69 Stat. 14) (R. 5, 7). The petitioner protested this assessment, claiming that the proper rate of tax was $10.50 per proof gallon ($9.45 per wine gallon), on the ground that otherwise it would exceed the internal revenue tax on "like" domestic products and consequently violate Part II.

Article III, of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A18, as amended, 62 Stat. 3680. (R. 5-6). The Collector reviewed his assessment but adhered to his original determination on the basis of *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463 (R. 7).

1. *Internal Revenue Code and the General Agreement on Tariffs and Trade.* a. Section 2800 (a)(1) of the 1939 Internal Revenue Code, as amended, imposed a tax of $10.50 per gallon upon distilled spirits of 100 proof or less, with a proportionate addition for proof above 100. Payment was due as soon as the spirits were produced or, if they were imported into the United States, at the time of importation. However, if the spirits were immediately placed in a bonded warehouse upon production or importation, the tax could be postponed until they were withdrawn from bond. This scheme of taxation, involving a flat rate for spirits of 100 proof or less ("wine gallon" rate), and a graduated rate for overproof spirits ("proof gallon" rate), has been a part of internal liquor taxation for almost a century. See Act of July 20, 1868, 15 Stat. 125. Similarly, the time for payment of the tax upon domestic and imported liquors, prescribed by Section 2800(a)(1), long antedated the General Agreement on Tariffs and Trade. See Section 600(a) of the Revenue Act of 1918, 40 Stat. 1057, 1105. Only the amount of the tax has been varied by intervening tax acts.[1]

b. The General Agreement on Tariffs and Trade provides that imports into the United States from other

[1] *E.g.*, the Revenue Act of 1951 raised the basic tax from $6.00 per gallon to $10.50.

contracting nations "shall not be subject, directly or indirectly, to internal taxes * * * in excess of those applied, directly or indirectly, to like domestic products". 62 Stat. (Part III) 3680. However, the Agreement expressly permits the signatory nations to impose upon imports a "charge" equivalent to the internal tax imposed upon "like" domestic products. 61 Stat. (Part V) A15. And, while these Agreement provisions are to be applied "to the fullest extent", they are expressly subject to any "existing legislation". Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part VI) A2051.

2. *This litigation.* At trial, the petitioner's witnesses testified that the practice of domestic distillers is to place overproof gin in bond (R. 79, 101, 103). When the gin is removed from bond the tax is paid on the basis of proof gallons (R. 79, 101). The overproof spirits are then reduced to 90 proof by dilution and marketed without further federal taxation (R. 72). In addition, the petitioner's witnesses stated that domestic and imported 90-proof gins are similar with respect to taste, odor and color (R. 74, 115).

The Customs Court, one judge dissenting, relying upon *Bohemian Distributing Co., et al.* v. *United States*, 15 Cust. Ct. 121, C.D. 957, and *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463, overruled the petitioner's protest (R. 168-192). It reasoned that the "like" domestic products with which the imports are to be compared to test for tax equivalence are underproof domestic distilled spirits at the time the tax upon them is payable. Since both the imported underproof spirits and domestic underproof spirits are taxable on the wine-gallon basis, the court held that

"there is no discrimination against the foreign product" (R. 177). Indeed, the court observed, to permit underproof imported spirits to be taxed on a proof-gallon basis would discriminate *in favor of* the imported product (R. 180-181). This is because the domestic producer who chooses to pay the tax before diluting the gin to 90 proof, loses the taxes paid if the gin is lost or destroyed between the time it is removed from bond and the time it is marketed. The foreign producer, though, would not assume this risk. Moreover, the court pointed out, the foreign producer may export overproof distilled spirits to the United States and, just like the domestic distiller, dilute them after paying the internal revenue tax on the proof-gallon basis (R. 180).

In a dissenting opinion, Judge Donlon concluded that the tax upon imported underproof spirits operates indirectly to discriminate against imported 90 proof London dry gin (R. 181-192).

The Court of Customs and Patent Appeals unanimously affirmed (Pet. 1a-11a). It held that the section did not assess against imported distilled spirits a greater tax, directly or indirectly, than that assessed against like domestic products because the tax is "assessed 'directly' upon *different* merchandise on a basis dependent upon the physical condition when withdrawn from bond or imported into this country" (Pet. 7a). The court also stressed that the foreign producer, just like the domestic distiller, can control the alcoholic content of his liquor so as to be either underproof or overproof on the tax date (Pet. 7a).

ARGUMENT

The General Agreement on Tariffs and Trade prohibits signatory nations from subjecting imports, directly or indirectly, to internal taxes in excess of those applied to like domestic products. *Supra*, pp. 2-4. The courts below, consonant with prior decisions construing similar provisions in other international trade agreements, have held that the internal tax provided by Section 2800(a)(1) is imposed equally upon "like" imported and domestic distilled spirits. That decision is correct and further review by this Court is not warranted.[2]

1. The only distinction among distilled spirits which is drawn by Section 2800(a)(1) is based not upon the place of production but upon alcoholic content, *i.e.*, distilled spirits of less than 100 proof are taxed on the wine-gallon basis while the tax upon distilled spirits of 100 or higher proof is computed by proof gallons. Nevertheless the petitioner contends that the tax upon its underproof London dry gin should be assessed as if the gin were higher than 100 proof.

Acceptance of this theory would introduce into the Internal Revenue Code an unnecessary fiction, squarely conflicting with the clear terms of Section 2800(a)(1). For one thing, the General Agreement on Tariffs and Trade does not require 90 proof imported London gin to be taxed on the basis of alcoholic content merely

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[2] Since the Court of Customs and Patent Appeals held that Section 2800(a)(1), as applied, did not constitute a violation of the General Agreement, it did not reach the question of whether the Agreement was, in fact, applicable to that section. In view of the limitation concerning "existing legislation" found in the Provisional Protocol, we believe that the Agreement is inapplicable to Section 2800(a)(1), at least to the extent of the tax in effect on January 1, 1948.

because gin of more than 100 proof is so taxed. Rather, the Agreement merely prohibits unequal taxation on "like" imported and domestic products. And while all distilled spirits, regardless of proof, possess certain similarities, the distinction, inherent in internal revenue statutes for almost a century, between underproof and overproof spirits is altogether reasonable and serves to describe unlike products.

2. The petitioner suggests that the question of the proper tax base for imported underproof distilled spirits is novel because the General Agreement's prohibition against unequal internal taxes "does not appear to have been placed in any prior trade agreement to which the United States was a party" (Pet. 12). However, as the petitioner implicitly recognizes, the Cuban reciprocal trade agreement involved in *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463, was in all essentials the same as the General Agreement, except that it did not include the phrase "directly or indirectly" in prohibiting discrimination, by unequal internal charges, against imported products (Pet. 12-13). Similarly, the Canadian and English agreements which were construed in *Bohemian Distributing Co.* v. *United States*, 75 Cust. Ct. 121, C.D. 957, were essentially identical to G.A.T.T., with the same reservation. In both of these cases, it was held that the Internal Revenue Code did not discriminate against imported underproof distilled spirits. The petitioner's stress upon the word "indirect" in attempting to distinguish the *Vernon* case is unwarranted since one of the obvious purposes of the Cuban agreement, as well as of the Canadian and English agreements involved in *Bohemian Distributing*, was

precisely that of the General Agreement, *i.e.*, to ensure that imported goods would not be subjected to disparate internal taxes.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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